IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 1404, Misc.

DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN, d/b/a DO-RIGHT AUTO SALES, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, and each Circuit Judge in regular active service thereon,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION, PETITION FOR WRITS OF MANDAMUS AND PROHIBITION AND ARGUMENT IN SUPPORT THEREOF

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MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION AND ARGUMENT IN SUPPORT THEREOF

The Petitioners move the Court for leave to file the Petition for Writs of Mandamus and Prohibition hereto annexed; and further move that an order and rule be entered against the United States Court of Appeals for the Seventh Circuit, and each Circuit Judge in regular active service thereon, to show cause why writs of mandamus and prohibition should not be issued against them in accordance with the prayer of said Petition, and

why your Petitioners should not have such other and further relief in the premises as may be just and meet.

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ORDER BELOW

The order of the Court of Appeals for the Seventh Circuit, unpublished, appears as Appendix A hereto.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on February 2, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1651.

QUESTION PRESENTED

Whether Seventh Circuit Rule 28, which prohibits the publication of written "Orders" which set forth reasons for judgments, and further prohibits a litigant from citing as precedent and relying upon such orders, denies due process of law and violates First Amendment Rights?

CIRCUIT RULE INVOLVED

Circuit Rule 28 (The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the U.S.):

Policy

It is the policy of this circuit to reduce the proliferation of published opinions.

Publication

The Court may dispose of an appeal (1) by an order or (2) by an opinion, which may be signed or per curiam.

Orders shall not be published and opinions shall be published.

"Published" or "publication" means:

(1) Printing the opinion as a slip opinion;

(2) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested U.S. attorneys, departments and agencies and the news media;

(3) Permitting publication by legal publishing companies as they see fit; and

(4) Unlimited citation as precedent.

Unpublished Orders:

(1) Shall be typewritten and reproduced by copying machine;

(2) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and shall be available to the public on the same basis as any other pleading in the case;

(3) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order, such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth.

(4) Shall not be cited as precedent (a) to any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose, except to support a claim of *res judicata*, collateral estoppel or law of the case.

Guidelines for Method of Disposition

Published opinions:

Shall be filed in signed or per curiam form in appeals which

(1) Establish a new or change an existing rule of law;

(2) Involve an issue of continuing public interest;

(3) Criticize or question existing law; or

(4) Constitute a significant and non-duplicative contribution to legal literature.

(a) by a historical review of law;

(b) by describing legislative history; or

(c) by resolving or creating a conflict in the law.

Unpublished orders:

(1) May be oral and delivered from the bench, which shall be recorded by the Clerk of the Court, or in writing with only, or little more than, the judgment rendered, in appeals which

(a) are frivolous or

(b) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where

(i) a controlling statute or decision determines the appeals;

(ii) issues are factual only and judgment appealed from is supported by evidence;

(iii) order appealed from is nonappealable or this Court lacks jurisdiction or appellant lacks standing to sue; or

(2) May be in writing and contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(a) are not frivolous but

(b) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

Responsibility for Determining Whether Disposition is to be by Order or Opinion

The determination to dispose of an appeal by unpublished order or published opinion shall be made by a majority of the panel rendering the decision.

The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

Effective Date

The effective date of this rule is February 1, 1973.

STATEMENT OF THE CASE

On July 2, 1975, the Secretary of State of Illinois revoked, pursuant to Illinois Revised Statutes, Chapter 95 1/2, Secs. 5-501 (a)(5) and (6), without prior hearing, petitioners' "dealer's certificate of authority" to operate Do-Right Auto Sales. Petitioners first learned of this revocation when an investigator pulled Do-Right's license off the wall and forced petitioners immediately to cease operating their business. On July 23, 1975, petitioners filed a civil action, No. 75 C 2421, in the United States District Court for the Northern District of Illinois, on their own behalf and on behalf of all others similarly situated, challenging the constitutional validity of the Illinois statute which permits revocation of licenses without prior hearings. The complaint sought, *inter alia*, injunctive relief. Judge Frank J. McGarr issued an order temporarily restraining the Secretary of State from revoking the petitioners' license without a prior hearing.

In conjunction with the civil action, petitioners filed a motion to convene a three-judge court to consider and determine the constitutionality of the challenged Illinois statute. On December 19, 1975, Judge Joel M. Flaum, to whom the civil action had been assigned, denied the motion to convene a three-judge court.

Petitioners subsequently filed in the United States Court of Appeals for the Seventh Circuit a petition seeking a writ of mandamus directing the District Court to order the convening of a three-judge court. Petitioners relied upon *Valentino v. Lynch*, No. 73-1089 (7th Cir.

June 8, 1973) (unpublished).[1] In response, the Attorney General of Illinois filed, pursuant to Seventh Circuit Rule 28, a "motion to strike" all references by petitioners to the *Valentino v. Lynch* "unpublished order".

The Seventh Circuit, pursuant to Circuit Rule 28, which prohibits the citation as authority or reliance upon unpublished orders, granted the "motion to strike" and denied, without comment, the petition for writ of mandamus.[2]

[1] This "unpublished order" is set forth as Appendix B hereto.
[2] The order is set forth in Appendix A hereto.

REASONS FOR GRANTING THE WRITS

I.

SEVENTH CIRCUIT RULE 28, WHICH PROHIBITS THE PUBLICATION OF WRITTEN "ORDERS" WHICH SET FORTH REASONS FOR JUDGMENTS, AND FURTHER PROHIBITS A LITIGANT FROM CITING AS PRECEDENT AND RELYING UPON SUCH ORDERS, DENIES DUE PROCESS OF LAW AND VIOLATES FIRST AMENDMENT RIGHTS.

Whether Circuit Judges should prepare written opinions is not at issue in this proceeding. The sole issue petitioners raise before this Court is the propriety of a Circuit Court of Appeals Rule which acts as a prior restraint on First Amendment rights, denies due process and undermines the case system by which American lawyers traditionally advocate their clients' causes and by which American jurists, legal scholars and practicing lawyers gauge and develop American law.

Seventh Circuit Rule 28 specifically prohibits the citation of "unpublished orders" as precedent: "(a) to any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose, except to support a claim of *res judicata*, collateral estoppel or the law of the case." This same Rule prohibits publication of the written reasoning which often is incorporated into such "orders." While the Rule provides that unpublished orders ". . . shall be available to the public on the same basis as any other case," such orders must be ferreted out of court files without the aid of any subject index, annotation or digest. If, by serendipity, a relevant order is discovered, neither advocate nor judge is permitted to rely upon it.

The instant case presents a clear and compelling example of the injustice brought to bear by this Rule. Petitioners sought to rely upon *Valentino v. Lynch*, in which the Seventh Circuit ordered, by mandamus, the convening of a three-judge court in its underlying case, *Valentino v. Howlett, Secretary of State of Illinois*, No. 72 C 2941 (N.D. Ill.). In *Valentino v. Howlett*, the plaintiff challenged the constitutionality and sought to enjoin the enforcement of a similar Illinois statute by which the Secretary of State deprived persons of driver's "hardship" licenses without affording them procedural due process and equal protection. Petitioners considered, and continue to consider, *Valentino v. Lynch* to be a ruling "on all fours" with the instant case and, but for its unpublished status, a ruling which would be binding precedent upon the District Court. The Seventh Circuit, in its "Order" in *Valentino v. Lynch*, included a written statement (covering more than three single-spaced typewritten pages) of its reasons for issuing the mandamus. In so doing, the Seventh Circuit relied upon and interpreted four decisions of this Honorable Court as well as a Second Circuit decision. Because the *Valentino v. Lynch* "Order" was designated as an "Unpublished Order" pursuant to Seventh Circuit Rule 28, petitioners in the instant case were prohibited from citing it or relying upon it as precedent.

Circuit Rule 28, by prohibiting publication and citation of "orders" such as *Valentino v. Lynch*, constitutes a prior restraint upon freedom of speech. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Branzburg v. Hayes*, 408 U.S. 665 (1972). The impossibility of locating relevant cases among those unpublished decisions, along with the Rule 28 prohibition against the use of unpublished opinions as precedent, also impinges upon the

First Amendment right to petition the government for redress of grievances.

This Rule also carries serious consequences for the fair and equal administration of justice. The Seventh Circuit Rule proclaims as its rationale the "policy . . . to reduce the proliferation of published opinions."[3] Certainly this policy cannot outweigh the constitutional rights which this Rule impairs. As this Court stated in *Stanley v. Illinois:*

> . . . the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. (405 U.S. 645, 656 [1972])

cf. *Reed v. Reed*, 404 U.S. 71, 76 (1951).

The availability of and reliance upon judges' written reasons for their decisions also is essential to the stability of law. It is clear that if written opinions are

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[3] Petitioners question whether, in this age of computers and microfilm, the Seventh Circuit's concern over the proliferation of published opinions is not one that can be handled by advanced methods of technology and information handling rather than by restriction of output. See Sprowl, *Computer-Assisted Legal Research: Westlaw and Lexis*, 62 A.B.A.J. 320 (1976). As James N. Gardner has observed:

> "The concept of law has come a long way from the Dark Ages to the advanced jurisprudence of the American legal system. But the return path may be considerably shorter. It need not be taken, if we will heed Becarria's admonition to make of the law 'a book . . . sacred and open to all.' "

Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?* 61 A.B.A.J. 1224, 1227 (1975).

available and utilized in advocacy, the possibility of unannounced changes in the law is lessened. *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). As Karl Llewelyn stated in *The Bramble Bush:*

> "whereas the courts might make records and keep them, but yet pay small attention to them; or might pay desultory attention; or might even deliberately neglect an inconvenient record if they should later change their minds about that type of case, the lawyer searches the record for convenient cases to support his point, presses upon the court what it has already done before, capitalizes the human drive toward repetition by finding, by making explicit, by urging, the prior cases . . . [precedent] . . . gives a basis from which men may predict the action of the courts; a basis to which they can adjust their expectations and their affairs in advance." (at 65-66)

In the instant case, the Seventh Circuit, by its Rule, has applied different law to petitioners than was applied to Valentino, although the legal issues are materially identical.[4] Inconsistent decisions (one published, one unpublished) resulting from a similar Ninth Circuit rule recently were brought to light in an American Bar Association Journal article. That article concluded:

> Writing in the 1760s, the Italian Jurist Cesare Becarria concluded that the most significant factor behind Europe's emergence from a dark age of lawless tyranny was not better rulers, better judges, or even better laws. It was rather "the art of printing, which makes the public, and not a few individuals, the guardians of the sacred laws."[5]

The Seventh Circuit Rule not only denies equal access to the law but precludes those who find it from using it on their behalf.[6] An impermissable system of private law, carefully guarded by a few judges, is created thereby.

[4] Despite the Rule's unequivocal prohibition against citation of "unpublished orders" as precedent, there are indications that the Rule is not uniformly followed by judges within the Seventh Circuit. For example, in *Love v. Howlett*, No. 75 C 1821 (N.D. Ill.), Love challenged the constitutionality of a different section of the same statute challenged in the instant case, which permitted the Secretary of State to revoke, without prior hearing, Love's driver's license. In his memorandum in support of his motion to convene a three-judge court, Love relied substantially upon *Valentino v. Lynch*. In Love's case, the citation of *Valentino v. Lynch* was not stricken, and the three-judge court was convened.

Another serious problem with the Rule, also raising important equal justice and due process questions, is its provisions for limited distribution. Ready knowledge of the existence of these unpublished orders, which contain important legal reasoning, is thereby restricted to a privileged few.

II.

THE RELIEF SOUGHT IS AVAILABLE ONLY IN THIS COURT.

The writs requested by petitioners should be granted pursuant to an exercise of this Court's appellate jurisdiction and supervisory power under 28 U.S.C. § 1651. This Petition challenges the validity of a Rule promulgated,

[5] Gardner, *supra* note 3, at 1227.

[6] The Seventh Circuit Rule permits citation by party litigants of unpublished orders in connection with claims of *res judicata* or collateral estoppel, but not for other purposes. Equal protection is thereby denied, both as to non-party litigants *vis-a-vis* party litigants and to party litigants who seek to cite the orders for other purposes. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Another equal protection problem is raised by the Rule's limited application to federal courts within the Seventh Circuit. Litigants and judges in other circuits and in state courts can cite and rely upon Seventh Circuit unpublished orders. See *Avco Corp. v. Aero Lodge No. 735, I.A. of M. & A.W.*, 390 U.S. 557, 559 (1968).

effective February 1, 1973, by a majority of the Seventh Circuit judges in regular active service.[7]

The writs requested are appropriate. Rules in other federal circuits and some state courts, similar to the Seventh Circuit Rule,[8] are coming under attack by members of the bar, and the validity and proper scope of such rules is an issue of great importance to the fair administration of justice.[9] Moreover, in the instant case, a single judge presently is exercising jurisdiction in a case involving a constitutional challenge to a state statute, which is required to be heard by three judges. Writs of Mandamus or Prohibition have previously been issued by this Court to remedy such circumstances.[10] Petitioner and the judges within the Seventh Circuit are prohibited by the Seventh Circuit Rule from utilizing as precedent the *Valentino v. Lynch* "Unpublished Order" which states clear reasons why the three-judge panel should be convened.

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[7] Each circuit is granted authority to promulgate its own rules pursuant to Rule 47 of the Federal Rules of Appellate Procedure. Unlike the Federal Rules of Appellate Procedure, neither this Court nor Congress approves the Circuit Rules.

[8] The First, Second, Fifth, Sixth, Eighth, Ninth and Tenth Circuits also have promulgated rules limiting publication of opinions. Many of these rules prohibit citation of unpublished orders or opinions as precedent, as does the Seventh Circuit Rule. Each of these differs in certain respects from the others, except for the identical Fifth and Eighth Circuit Rules. These nuances of difference raise additional due process and equal protection problems.

[9] In the January, 1976, issue of the American Bar Association Journal, two letters to the Editor, one from each Coast, applauded the Gardner article criticizing the Ninth Circuit Rule. 62 A.B.A.J. 6 (1976). See note 3, *supra*.

[10] *Ex Parte Northern Pacific Railway Co.*, 280 U.S. 142 (1929); *Ex Parte Cogdell*, 342 U.S. 163 (1951).

CONCLUSION AND PRAYER FOR RELIEF

Wherefore, Petitioners pray:

1. That writs of mandamus and prohibition issue from this Court directed to the Honorable United States Court of Appeals for the Seventh Circuit, and to each Circuit Judge in regular active service thereon, to show cause on a day to be fixed by this Court why mandamus and prohibition should not issue from this Court directing said respondents:

(a) to cease and desist from the enforcement of Seventh Circuit Rule 28;

(b) to repeal Seventh Circuit Rule 28;

(c) to vacate and expunge from the record the order of February 2, 1976, striking petitioners' reference to the unpublished order in *Valentino v. Lynch* and denying a petition for mandamus to the Honorable Joel M. Flaum, Judge of the United States District Court for the Northern District of Illinois;

(d) to consider, in light of *Valentino v. Lynch*, the aforesaid petition for mandamus to the Honorable Joel M. Flaum, Judge of the United States District Court for the Northern District of Illinois.

2. That petitioners have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

No. 76-1022

DO-RIGHT AUTO SALES, TIMOTHY O'BRIEN, THOMAS O'BRIEN, d/b/a DO-RIGHT AUTO SALES, individually and on behalf of all others similarly situated,

Petitioners,

v.

HON. JOEL M. FLAUM, Judge of the United States District Court for the Northern District of Illinois; and MICHAEL J. HOWLETT, Secretary of State of Illinois,

Respondents.

ORIGINAL PETITION FOR WRIT OF MANDAMUS

SUBMITTED: JANUARY 30, 1976
DECIDED: FEBRUARY 2, 1976

This matter comes before the Court on the "ORIGINAL PROCEEDING FOR A WRIT OF MANDAMUS" filed herein on January 8, 1976 by counsel for the petitioners; the "ANSWER OF RESPONDENT TO PETITION FOR WRIT OF MAN-

DAMUS" filed herein on January 29, 1976; and the "MOTION TO STRIKE" also filed herein on January 29, 1976 by counsel for the respondent, Michael J. Howlett, Secretary of State of Illinois. On consideration whereof,

IT IS ORDERED that the respondents' "MOTION TO STRIKE" all references made by the petitioners to the unpublished order in *Valentino v. Lynch* is hereby GRANTED pursuant to Circuit Rule 28.

IT IS FURTHER ORDERED that the aforesaid petition for writ of mandamus be, and the same is hereby, DENIED.

APPENDIX B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Before
HON. TOM C. CLARK, *Associate Justice**
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

No. 73-1089

JOSEPH C. VALENTINO,

Petitioner,

v.

HON. WILLIAM J. LYNCH, et al.,

Respondents.

PETITION FOR WRIT OF MANDAMUS

No. 73-1002

JOSEPH C. VALENTINO,

Plaintiff-Appellant,

v.

MICHAEL J. HOWLETT, Secretary of State,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 72 C 2941
William J. Lynch, *Judge.*

ARGUED MAY 25, 1973 — DECIDED JUNE 8, 1973

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* Associate Justice Tom C. Clark, Supreme Court of the United States, Retired, is sitting by designation.

ORDER

Petitioner Joseph Valentino seeks a writ of mandamus directing the district court to order the convening of a three-judge court to hear and determine the constitutionality of a state statute restricting the issuance of a temporary driving permit in hardship cases where a driving license has been withdrawn pursuant to the Illinois Financial Responsibility Act, and to enjoin enforcement of the state statute. Petitioner's complaint, filed November 21, 1972, alleged that Ill. Rev. Stat., ch. 95 1/2, subchapters 6 and 7, unconstitutionally denies plaintiff and all others similarly situated equal protection of the laws in that it prevents them from obtaining restricted driving permits without complying with the security provisions of the Illinois Financial Responsibility law while permitting others whose licenses have been revoked for a variety of other reasons, including reckless homicide, to obtain hardship driving permits without any special requirements. The district judge denied petitioner's motion for a three-judge court, a motion for a preliminary injunction, and a motion to determine the propriety of a class action. The district court retained jurisdiction of the action, however, and ordered the defendant to file an answer within twenty days of its order.

An order denying a three-judge court is not in itself appealable. 9 Moore, Federal Practice ¶ 110.03 [3] at 74. Mandamus has been held to be the proper remedy and the court of appeal the proper forum in cases where the district judge does not dismiss the case yet refuses to convene a three-judge court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962); *Cancel v. Wyman*, 441 F.2d 553 (2d Cir. 1971); 9 Moore, supra, at 74.

The Supreme Court held in *Idlewild Bon Voyage Liquor Corp., supra*, 370 U.S. at 715, that "[w]hen an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." The Court reaffirmed this view recently in *Goosby v. Osser*, ... U.S. ....., 41 U.S.L.W. 4167 (Jan. 17, 1973), stating "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous" and that a "claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' " 41 U.S.L.W. at 4169.

Under these tests the question raised by the petitioner is clearly not wholly insubstantial. The Supreme Court in *Bell v. Burson*, 402 U.S. 535 (1971), held that drivers' licenses involve important interests and that "licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* at 539. The Court also stated that while the state possesses the power to bar the issuance of licenses to all motorists who do not carry liability insurance or who do not post security, it "does not follow . . . that the amendment also permits the . . . statutory scheme where not all motorists, but rather only motorists involved in accidents, are required to post security under the penalty of loss of the licenses." *Id.* See also *Perez v. Campbell*, 402 U.S. 637 (1971)

We conclude and mandate that the district judge notify the Chief Judge of this Circuit to designate two additional judges to constitute, with the district judge herein, a three-judge court to hear and decide the constitutional question raised by the petitioner. Petitioner filed a protective appeal from the denial of a preliminary injunction. The judgment in that case,

docketed as No. 73-1002 in this Court and argued with the petition for mandamus, will be vacated and remanded for further proceedings consistent with the views expressed in this opinion. The temporary injunction granted by this Court pending the petition for mandamus and the appeal will be continued until a three-judge court is convened. At that time that court can determine whether to issue a continuing injunction.

MANDAMUS ISSUED

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March 31, 1976

William Beltz, Executive Editor
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1231 25th Street N.W.
Washington, D.C. 20037

Dear Mr. Beltz:

I am enclosing for your information a copy of a mandamus petition filed in the United States Supreme Court. The petition seeks relief from the Seventh Circuit Court of Appeals rule which regulates publication of rulings and prohibits citation of "unpublished orders", even where the court has provided written reasons within the text of the order.

Recently this rule and similar rules in other circuits have been subjected to criticism by members of the legal profession. Last October, the American Bar Association Journal published an article expressing concern over the similar Ninth Circuit rule.

It would seem that legal publishers would be among those parties interested in the outcome of any dispute concerning the right to publish and cite opinions. I would be most pleased to hear your thoughts concerning rules of this nature.

Very truly yours,

Theodore M. Becker

TMB/djb
enclosure